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In The
Supreme Court of the United States
October Term, 1992

No. 92-1988

Ticor Title Insurance Company, *et al.*,

Petitioners,

v.

Walter Thomas Brown and Jeffrey L. Dziewit,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

INTEREST OF PUBLIC CITIZEN

This case raises the issue of whether absent members of a plaintiff class have an absolute right to opt out of a class action involving substantial damage claims. This brief is filed, with the written consent of the parties, on behalf of Public Citizen, a non-profit public interest organization with over 165,000 members.

Public Citizen, through the attorneys in its Litigation Group, has represented named plaintiffs and absent class members in class actions for money damages, in which it has

consistently supported the right to opt out. As a result of its work in this area, Public Citizen is committed to ensuring that the class action procedure is employed to aid the resolution of cases involving large numbers of similar claims without depriving absent class members of their rights under Rule 23 of the Federal Rules of Civil Procedure and their constitutional right to due process. Public Citizen does support the use of the mandatory class action device -- one in which absent class members may not opt out -- as a means of completely resolving the various competing claims of all parties and non-parties, but only in certain types of cases. This is not such a case, and to permit a mandatory class here would foreclose viable and substantial damage claims without adequate justification.

Public Citizen submits this brief for two reasons: (1) to offer a non-constitutional ground for deciding that respondents were denied their opt out right in this case, i.e., that the class should have been certified only under Rule 23(b)(3) of the Federal Rules, which provides for the same right to opt out that due process requires; and (2) to present our somewhat different analysis of the due process issue than respondents may offer. Public Citizen has long advocated the use of the three-part test in *Mathews v. Eldridge*, 424 U.S. 319 (1976) -- a case not previously relied on by this Court in this context -- and believes that it is applicable to the due process issues presented in this case. While petitioners also urge the use of *Mathews* with respect to the opt out issue, they take a rather different view of its applicability to this case than is presented in this brief.

STATEMENT OF THE CASE

In 1986, petitioners, six title insurance companies, obtained judicial approval to settle twelve separate class actions in which they were defendants. Those actions, which were filed after the Federal Trade Commission (FTC) initiated an enforcement action against petitioners, had been

consolidated as MDL 633 in the Eastern District of Pennsylvania. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶67,149 (E.D.Pa. 1986)(Pet. App. 31a - 77a). Petitioners argue that the MDL 633 judgment precludes respondents from litigating their claims for substantial money damages in the current action, which was later filed in the United States District Court for the District of Arizona.

The complaints of the MDL 633 plaintiffs principally sought treble damages for injuries sustained by consumers in thirteen states, including Arizona and Wisconsin, as a result of unlawful price fixing of title services by petitioners. None of the original twelve actions that comprised MDL 633 was filed by a resident of Arizona or Wisconsin, and none of the named plaintiffs was alleged to have been injured by petitioners' activities in those states. All of the complaints were class actions, and all sought certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

During the pendency of the MDL proceedings, this Court decided *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985), involving the state action defense to antitrust liability, which lowered the expectations of the named plaintiffs' attorneys in MDL 633 about their cases. Pet. App. 33a. Pricing of title services is governed by state law and the state action defense to antitrust liability hinges on the manner in which a state regulates the industry. *Southern Motor Carriers* helped petitioners because it expanded the state action defense to situations where collective rate making conduct was merely permitted, but not mandated, by state law. As a result, the defense protects petitioners in cases where (1) the state has clearly articulated and affirmatively expressed a policy permitting collective rate making, and (2) the state actively supervises the rating activity. *Id.* at 57.

The attorneys representing the MDL 633 plaintiffs recognized that each of the thirteen affected states had

statutes that permitted collective ratemaking. Pet. App. 34a. Therefore, the viability of the defense depended on whether each of the states actively supervised petitioners' ratemaking activities, which could only be determined by an individual assessment of each state's regulatory program. *See, e.g., Federal Trade Comm'n v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992). Seeing their own claims as uncertain, the plaintiffs' attorneys commenced settlement discussions with the six defendants. Pet. App. 36a. Before the MDL 633 court determined whether any of the states actively supervised the defendants' ratemaking activities, the parties reached a proposed settlement. Pet. App. 37a.[1]

The MDL 633 settlement purported to foreclose the damage claims of all members of the class in every state against all the petitioners. In exchange, the settlement offered all class members a slight coverage increase for each title insurance policy issued from 1981 to 1985 or, for class members who did not hold their own policies during that period, a one-year window of opportunity to purchase a new policy with slightly higher coverage than usually received for

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[1]Notwithstanding this Court's decision in *Southern Motor Carriers*, the FTC continued its enforcement proceeding against petitioners for alleged violations in Arizona, Wisconsin, and four additional states, although it dropped its claims relating to collective ratemaking in seven other states based on the state action defense. The FTC eventually concluded that the state action defense did not shield petitioners' activities in Wisconsin and Arizona. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Final Order (September 19, 1989). The Third Circuit reversed on the grounds of state action immunity, *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 922 F.2d 1122 (3d Cir. 1991), and this Court reversed the judgment of the Third Circuit, remanding the case for further proceedings consistent with the conclusion that petitioners were not entitled to state action immunity in Wisconsin and might not be entitled to such immunity in Arizona. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 112 S. Ct. at 2179.

the price of the policy. Pet. App. 38a. The MDL 633 court recognized that these so-called "enhancement" provisions did not provide any direct benefit to class members and that some members of the class might not benefit at all from these provisions. Pet. App. 65a-67a. However, the court saw some benefit to class members in the additional shifting of the risk of failure of title. Pet. App. 65a-66a.

The settlement did not affirmatively require any specific restructuring of the title insurance industry. Instead, it merely included an 18-month injunction against rating bureau activity in six states -- Arizona, Wisconsin, and the four other states that were still part of the FTC's action against the title insurers. Although petitioners had previously withdrawn from rating bureaus in these six states, and accordingly were not affected by the injunction, the MDL court explained that the companies were sacrificing their right to return to such practices, at least for 18 months. Pet. App. 70a. The injunction specifically allowed the continuation of collective ratemaking in the other seven states, as long as the activities would have been protected by the state action defense. Finally, the settlement provided for the payment of costs and $715,000 in attorneys' fees to class counsel.

The settlement was contingent upon the preclusion of every claim of every class member, large or small, arising out of allegations that petitioners conspired to affect the prices of title services from 1981 to 1985, and it did not permit any class member to opt out. Although the MDL 633 court recognized that one of the primary factual issues, the "quantum of active supervision of the rate-making process in each state . . . may vary somewhat in the different affected states," Pet. App. 44a, the court yielded to the parties' request that the class be certified as a mandatory class action pursuant to Rules 23(b)(1)(A) and 23(b)(2), and the court did not consider whether the class was properly certifiable under Rule 23(b)(3), as the plaintiffs had originally maintained in their complaints. Pet. App. 56a.

The Attorney General of Arizona attempted unsuccessfully to opt out of the settlement class, on behalf of the state and its citizens, and the Attorneys General of Wisconsin and four other states objected to the settlement. However, the MDL 633 court refused to permit anyone to opt out, Pet. App. 50a-51a, and it overruled all objections in approving the settlement in June 1986. The Third Circuit affirmed without opinion. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988)(Pet. App. 78a-79a).

In a related case, litigated prior to the current action, the Arizona Attorney General sued petitioners in Arizona state court on behalf of state school districts seeking damages under Arizona's state antitrust law. Petitioners sought, and the MDL 633 court entered, an order enjoining the prosecution of the Arizona state case on *res judicata* and substantive grounds. However, the Third Circuit vacated the injunction, recognizing that, because the MDL 633 class action sought both injunctive and damages relief, the settlement could be collaterally attacked by any absent class member who did not have minimum contacts with the MDL 633 forum and who had neither consented to jurisdiction nor received an opportunity to opt out. *In re Real Estate and Settlement Services Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

Thereafter, respondents, who are residents of Arizona and Wisconsin, filed the present antitrust action in the United States District Court for the District of Arizona on behalf of a class of Arizona and Wisconsin title insurance consumers. Like the complaints that were consolidated in MDL 633, the complaint here was filed under Rule 23(b)(3) and principally sought treble damages. J.A. 9-11. Petitioners moved for summary judgment, in part on the ground that respondents were members of the mandatory class in the MDL 633 settlement and, therefore, were bound by the doctrine of *res judicata*. The district court refused to allow respondents to

pursue their claims for substantial damages on the ground that the previous settlement had extinguished all damage claims of the members of the class certified in MDL 633. Pet. App. 17a - 30a.

The Ninth Circuit reversed, holding that minimal due process would be violated if respondents' damage claims were barred by *res judicata*. Recognizing that *res judicata* cannot bar an absent plaintiff from litigating a claim if the plaintiff was not adequately represented or was denied due process, the court explained that "'minimal due process requires that an absent plaintiff be provided with an opportunity to remove himself from the class,' . . . if monetary claims are involved." Pet. App. 12a (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). Because no such right was provided in the MDL 633 litigation, the Ninth Circuit held that respondents could litigate their damage claims in this action.

SUMMARY OF ARGUMENT

I. While, in this Court, this case has focussed primarily on whether the prior action deprived respondents of their antitrust claims in violation of the Due Process Clause, this Court has consistently refused to decide a constitutional question if there is some other ground upon which to dispose of the case. That principle is fully applicable here; this Court need not reach the constitutional issues presented because, under the plain terms of Rule 23, respondents' substantial damage claims made the class in the MDL 633 action certifiable only as an opt out class under Rule 23(b)(3), and not as a mandatory class under Rules 23(b)(1)(A) or 23(b)(2).

The class action device is a limited exception to the traditional rule that a person must be a party in order to be bound by a prior judgment. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). This Court has historically held that a mandatory class action is only appropriate where the class

representatives hold a true common interest in the litigation. A judgment in a class action where this obligatory due process protection is not provided may be collaterally attacked and has no binding effect on absent class members. *Cf. Martin v. Wilks*, 490 U.S. 755 (1989).

Rule 23(b)(3) remains most faithful to the traditional rule that a person must be a party in order to be bound by a judgment in an action, and it must be utilized unless one of the other parts of Rule 23 clearly applies. By guaranteeing opt out rights, certification under subdivision (b)(3) seeks to take advantage of the efficiency of the class action procedure while ensuring that absent class members are only bound if they "consent" to appear by declining to opt out.

The other two certification provisions of Rule 23 stray farther from the traditional rule governing the binding effect of a judgment and are, therefore, limited to a narrow category of cases resting on specific equitable and practical circumstances, none of which is present here. Rule 23(b)(2) certification is only authorized when the relief sought is predominately injunctive and is essential to govern the defendants' future conduct towards the entire plaintiff class. Thus, for example, in a civil rights case involving complaints about a seniority system, the injunctive ruling must apply to everyone if there is to be a rule at all, and so there can be no opt outs from the injunctive aspect of the case. The MDL 633 case clearly was not appropriate for (b)(2) certification because it was primarily a case for money damages, as the complaints in the MDL 633 action, the current action, and the MDL 633 judgment, especially its purported preclusive effect, make clear. *See* J.A. 3, ¶ 1; Pet. App. 49a. Moreover, the injunctive relief was, for the most part, little more than a recasting of damage claims as an injunction where there was no practical need for a single outcome.

Similarly, certification under Rule 23(b)(1)(A) is only appropriate where the interests of the members of the class are inextricably intertwined, and separate actions create a

risk of inconsistent or incompatible judgments. Nothing in MDL 633 or this case creates that type of risk or requires the type of relief appropriate in (b)(1) cases.

Thus, because certification here was proper only under subdivision (b)(3), which entitled respondents to an opt out right which they were denied, respondents cannot be bound by the prior judgment.

II. Even if the MDL 633 class was properly certified, there has been a violation of due process because respondents have been denied the procedural protections to which they are entitled under the balancing test established by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In this context, this test focusses on: (a) the property interest of the class members in their claims against petitioners, (b) the need for additional procedural protections to avoid the erroneous deprivation of that property interest, and (c) the governmental interests at stake if greater protection were afforded. In addition, because the burden of increased procedural protection here would primarily burden petitioners, not the government, that interest should also be considered. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991).

The balancing of the interests in this case demonstrates that the standards of due process have not been met. First, the private interests of the class members -- their antitrust treble damage claims -- measured at the outset of this litigation, were viewed as "substantial" by the Third and the Ninth Circuits. Second, the risk of erroneous deprivation of that interest was significant since the case turned on the difference between the state action defense in the states where the named representatives purchased title services, and those of class members from other states, including Arizona and Wisconsin, where the state action defense is inapplicable because of the nature of the state laws regulating title services. Third, the government interest in disposing of litigation efficiently through a single class action, such as

MDL 633, and in encouraging settlement, is counterbalanced by the interests of the federal and state courts in Arizona and Wisconsin in protecting the interests of the class members in those states. As for the interests of petitioners, they must assume responsibility for part of the burden of relitigation for not affording the absent class members their due process right to opt out. Moreover, petitioners still retain the benefit of settlement as to all the other MDL 633 class members. Therefore, since the balancing of all the factors is decidedly against the maintenance of a nationwide class, without the right to opt out, due process has not been satisfied.

ARGUMENT

I. THE MDL 633 COURT IMPROPERLY FAILED TO CERTIFY THE ACTION BEFORE IT UNDER RULE 23(b)(3).

Although petitioners have presented this case solely as a constitutional challenge -- thus sidestepping the question whether the MDL 633 court properly applied Rule 23(b) -- this Court has long held that it "should 'not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181, 190 (1985)(declining to address constitutional issue on which certiorari was granted because case could be decided on statutory grounds not raised in petition)(citation omitted); *see also Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979). This Court recently reaffirmed that it has discretion to "decide[] a case on non constitutional grounds even though the petition for certiorari presented only a constitutional question." *Izumi Seimitsu Kogyo v. U.S. Philips Corp.*, No. 92-1123, 62 U.S.L.W. 4007, 4009 (U.S. Nov. 30, 1993); *accord Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). As we now explain, because Rule 23 entitled respondents to opt out, this Court

need not decide whether due process also requires that result.[2]

Under ordinary principles of *res judicata*, a person is not bound by a judgment in a litigation in which she is not designated as a party or made a party by service of process. *Hansberry v. Lee*, 311 U.S. at 41; *Martin v. Wilks*, 490 U.S. at 761. We agree with petitioners (Br. 19) that the class action procedure is an exception to this basic rule. Thus, Rule 23 recognizes that, in certain circumstances, when it is more equitable and efficient to litigate a large number of claims in one action, all those who are properly members of the class can be bound by the outcome of the litigation, even if they are not formal parties to it. Nevertheless, this Court recognized over fifty years ago in *Hansberry v. Lee* that:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests . . . .

311 U.S. at 44-45 (citations omitted). Finding that it would violate due process to bind individuals to a judgment in an earlier litigation in which they did not participate, were not

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[2]The fact that the class was certified for settlement purposes is of no significance to the question of whether certification was proper under Rule 23(b)(1)(A) and (b)(2). While the settlement may make the case more manageable, it cannot completely override the strictures of Rule 23 and does not in any way obviate the due process objections raised here.

adequately represented, and did not share a joint interest with parties who were in fact present, this Court allowed the *Hansberry* petitioners to collaterally attack the prior judgment. As petitioners here recognize, an absent class member has a due process right to collaterally attack a judgment in a separate action "if his or her individual interest was not properly protected in the case." Pet. Br. 26. This right to collaterally attack a class action judgment "is integral to the constitutionality of the class action procedure." *In re Real Estate*, 869 F.2d at 769. Since petitioners do not dispute the right of respondents to attack the prior judgment on due process grounds, and since the due process questions can be avoided if this case can be decided based on the Federal Rules, there is no reason why respondents, who were deprived of the opt out benefits of Rule 23(b)(3), should not be allowed to attack the MDL 633 judgment since they did not actually litigate the issue in the prior case, nor did they otherwise consent to be bound by the MDL 633 judgment. *Id.* at 770-71.

Under the certification procedure of Rule 23, a proposed class must meet the numerosity, commonality, typicality, and adequacy of representation prerequisites of Rule 23(a). Thereafter, the Rule provides three subsections which determine who, other than the named plaintiffs, will be bound by the resolution of the suit, with subdivision (b)(3) providing substantially more protection to absent class members than (b)(1) or (b)(2).

Certification under (b)(3) is available in those cases seeking monetary relief where a class action would save time, effort, and money, and would promote uniformity. However, (b)(3) certification may not sacrifice procedural fairness. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983). Consequently, Rule 23(c)(2) requires that, in any class action maintained under subsection (b)(3), individual notice must be sent to all class members who can be identified with reasonable effort, advising them that they have the right to be excluded from the action, as well as to

intervene or otherwise participate in the litigation. Fed. R. Civ. P. 23(c)(2). Because of this notice and opportunity to opt out, absent class members "consent" to being bound by the suit unless they exercise their opt out rights. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Accordingly, subdivision (b)(3) remains most faithful to the traditional rule that a person must be a party in order to be bound by a judgment.

Rules 23(b)(1) and (b)(2) deviate far more than Rule 23(b)(3) from traditional principles governing the binding effect of judgments because they do not require that an absent plaintiff be granted the opportunity to opt out. The constitutional legitimacy of these mandatory class action provisions rests on the fact that they are only applicable when unique equitable concerns, none of which applied to the MDL 633 case, make a single outcome essential. While this Court has historically recognized that the mandatory class action device is permissible, that is only true where the class representatives hold a true joint interest in the litigation. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854).[3]

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[3]Petitioners are correct that, "[w]here the parties are numerous, and . . . have or may have separate and distinct interests [and] . . . it is impractical to bring them all before the court," a decree in a class action may bind them. Br. 19. However, petitioners fail to note this Court's admonition that "though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce." *Smith v. Swormstedt*, 57 U.S. (16 How.) at 302-03. Thus, in *Smith*, this Court allowed the class action device to be used to determine the rights of over 4500 persons to a church fund. This practice, a precursor to the certification procedure sanctioned by Rule 23(b)(1)(B), applies only where there is a so-called "limited fund," and there has been no suggestion that a limited fund analysis applies here.

In a (b)(2) suit, "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the class seeks "appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The essence of the injury in such a case is a claim applying equally to all members of the class, and requiring compatible injunctive relief as a remedy. Thus, in a case challenging a seniority system or a pattern of discriminatory hiring, the employer must be subject to a single rule if there is to be any rule at all. Rule 23(b)(2) mandatory class actions involving monetary relief involve either (1) class claims for equitable injunctive and equitable monetary relief, *see Ablemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)("the court's discretion [to award back pay] is equitable in nature"), or (2) class claims for equitable relief and legal damages, where such "final relief . . . [does not relate] exclusively or predominately to money damages." 1966 Advisory Committee Notes, 39 F.R.D. 69, 102 (1966); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981)(allegations of plantwide discrimination settled in exchange for program to improve job opportunities and a settlement fund). Because the claims in (b)(2) actions are essentially identical to one another, and the relief sought necessarily controls the defendant's future conduct towards the class, opting out of a (b)(2) suit for injunctive relief might well destroy the court's ability to impose a unitary rule.

Similarly, in a case certified under Rule 23(b)(1)(A), the class members' claims are intertwined and, in the absence of a mandatory class, the party opposing the class might be obligated to engage in incompatible conduct towards the individual members of the class. Thus, this provision applies when equitable concerns require the courts to reach a result "further[ing] interests of all class members that certainly would have been impaired if individual suits, with inevitably

disparate results, had been allowed." *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977).

Under this analysis, it is plain that the MDL 633 class fell squarely within Rule 23(b)(3), with all its attendant procedural protections. The principal error of the MDL 633 court is that it focussed on the settlement agreement to determine which part of Rule 23(b) was appropriate, rather than on the plaintiffs' original claims for relief. Pet. App. 49a. All of the MDL 633 complaints sought (b)(3) certification, and all of the complaints principally sought money damages. While there were claims for injunctive relief, they sought little more than an order directing defendants not to violate the antitrust laws, something they clearly would not do again if they were held liable for treble damages. Moreover, the MDL plaintiffs never withdrew their damage claims, but instead simply agreed to abandon them in exchange for relief of questionable value -- characterized as "injunctive" -- plus $715,000 in attorneys' fees.

Indeed, even though the MDL 633 court characterized the relief as predominantly injunctive, Pet. App 49a, an examination of the settlement agreement demonstrates that its injunctive portion did not predominate and was of virtually no value. Thus, petitioners simply had to refrain for 18 months from rating bureau activity in six states -- the same six states that were still part of the FTC action against them. Aside from the fact that petitioners had already withdrawn from rating bureau activity in those states, Pet. App. 70a, everyone in the MDL 633 negotiation knew that the claims from these six states, which include Arizona and Wisconsin, were different from the claims in the other seven states and that there was at least a significant possibility that the state action defense did not have any force there. Moreover, the injunction did not prohibit the defendants from engaging in rating bureau activity in the other seven states where the state action defense already shielded the defendants from liability.

Therefore, the MDL 633 injunction did no more than permit the defendants to conduct business within the law.

The other principal provision of the settlement provided class members with enhanced insurance coverage, which the MDL court properly recognized was a hybrid type of damage relief that offered no direct benefit to any class member. Pet. App. 50a, 66a-67a. Since only a small number of claims are ever made on title insurance policies, and a much smaller number of these would exceed the original coverage, this "advantage" was not likely to benefit more than a few members of the plaintiff class. On the other hand, in exchange for these benefits, the settlement precluded all the damage claims of all the class members.

The justification offered by the MDL 633 court for nationwide certification under Rule 23(b)(2) was that the class "seeks to define the defendants' relationship with the world at large by seeking to limit the defendants' rating bureau activities." Pet. App. 49a (citing *Weiss v. York Hospital*, 745 F.2d 786, 806-807 (2d Cir. 1984)). However, because title services are regulated by each state, there is no legal basis to impose a single nationwide rule of conduct for the six defendant title insurance companies.[4] Furthermore, courts have only allowed Rule 23(b)(2) certification where classwide affirmative action by the defendant is essential and appropriate to remedy the plaintiffs' injuries or a significant threat of injury resulting from a present or impending violation of the law is likely to continue and is the essence of the injury. *Califano v. Yamasaki*, 442 U.S. at 701 (finding (b)(2) class relief would be appropriate because "[t]he ultimate question is whether a prerecoupment hearing is to be held [and] . . . [i]t is unlikely that differences in the factual

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[4]Indeed, it was necessary to submit the proposed settlement to the insurance department in each of the thirteen states in order to obtain the state insurance department's approval under its laws. Pet. App. 39a.

background of each claim will affect the outcome of the legal issue"); *Weiss*, 745 F.2d at 806-07, 829-31 (injunction tailored to prevent significant threat of future injury from further discriminatory practices); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987)(requiring two federal agencies to coordinate nationwide remedial program to remedy improper recoupment procedures). The relief sought in the MDL 633 action did not exhibit either one of these characteristics, even on a statewide basis, let alone in all thirteen states.

The nature of the defendants' alleged illegal activities also limits the likelihood of future injury to the plaintiffs and, hence, the propriety of (b)(2) certification and the need for prospective relief. The violations of the antitrust laws alleged in MDL 633 consisted of conduct that occurs openly because petitioners' tariffs are publicly filed. The only question is whether the state action doctrine permitted joint filing and, once that is decided, injunctive relief is of little practical consequence. Indeed, the MDL 633 class was defined in June 1986 to include only purchasers of title services from January 1, 1981 to December 31, 1985. Pet. App. 37a. This was plainly a retrospective class and not one for which future injunctive relief would be expected or required. Moreover, because the purchase of title services is not a frequent activity for an individual, the injured parties are not likely to be subject to a continuing course of forbidden conduct if no injunction is issued.

The MDL 633 court also certified a mandatory class under Rule 23(b)(1)(A), giving as its sole reason the risk of "inconsistent restructuring of defendants' rating bureau activities." Pet. App. 48a (citing *Reynolds v. National Football League*, 584 F.2d 280, 283-84 (8th Cir. 1978)). This reasoning is inapplicable here, however, because even an individual determination that petitioners violated the antitrust laws, which would entitle the plaintiff to treble damages, would not impair any other suit, nor would a finding that there was no such violation. While an injunction against future unlawful conduct might have some *stare*

decisis effect, at least in the same state, even that would not prevent plaintiffs in other states from obtaining any relief to which they were entitled. *Compare Reynolds*, 584 F.2d at 284; *Robertson*, 556 F.2d at 685.

This analysis makes clear that, viewed either from the perspective of the original complaints, from the perspective of the claims precluded by the settlement, or from the perspective of the relief accorded in the settlement itself, MDL 633 was primarily a class action concerning money damage claims, and there was no basis whatsoever to certify the damage portion of the case under any part of Rule 23 other than subsection (b)(3). In taking this position, *amicus* is aware of cases such as *Wetzel v. Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975), supporting a preference for (b)(2) classes when a (b)(2) and (b)(3) are both available, but these cases assume that both are proper, which is plainly not the case here. Insofar as injunctive relief predominates, (b)(2) may be properly employed. Even there, however, as the brief *amicus curiae* of the Lawyers' Committee for Civil Rights Under Law acknowledges, Br. 19-20, especially with respect to the 1991 amendments to Title VII, where there are genuine claims for damages, class members should be allowed to opt out of the damages portion of the case, once the liability issue and the form of injunctive relief are determined. Moreover, since it is undisputed that certification under (b)(3) is by far the most protective of the rights of absent class members, the alternative provisions should be construed to be available only when the specific equitable reasons for their use are present, such that the lack of a mandatory, non opt out class would make class relief impossible.

While certification as a mandatory class did dispose of all the claims in MDL 633, the approach followed there would allow wholesale evasion of not only the opt out requirements in Rule 23(b)(3), but the requirement of Rule 23(c)(2) of the best practicable notice and the explicit right of class members to intervene or otherwise participate. If

certification under Rules 23(b)(1) and 23(b)(2) is supportable simply because it is efficient, then it would be available in most multi-party cases and would thereby obliterate the carefully constructed differences among the sub-parts of Rule 23. *See McDonnell Douglas Corp. v. U.S. Dist. Ct. for the Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975)(expansive interpretation of Rule 23(b)(1) would render Rule 23(b)(3) "superfluous"); *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 (11th Cir. 1987); *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305 (6th Cir. 1984). Whatever the theoretical merits of such a scheme, it is not the plan envisioned by the drafters of Rule 23.

Moreover, Rule 23 recognizes that absent plaintiffs have an interest in litigating the merits of a case in a forum of their own choosing. That forum might be more convenient, might apply different and perhaps more favorable law, and would afford the absent plaintiffs an opportunity to have their own counsel who could emphasize a different theory of the case or focus on different evidence. The MDL 633 court, however, took none of these interests into account. Accordingly, respondents, who were not given adequate notice, an opportunity to exclude themselves from the class, or even to appear in the litigation, cannot be bound by the settlement in MDL 633 to the extent that it applies to damage claims because the class there could be certified, if at all, only under Rule 23(b)(3).

II. THE MDL 633 COURT DENIED RESPONDENTS DUE PROCESS BY ITS REFUSAL TO PROVIDE A RIGHT TO OPT OUT.

If the Court concludes that the MDL 633 case was properly certified as a mandatory class under Rules 23(b)(1) and 23(b)(2), then it must address the question whether, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Ninth Circuit was correct in holding that there would be

a violation of due process if respondents' damage claims were barred by *res judicata* in the absence of an opportunity to opt out of the MDL 633 litigation.[5]

According to petitioners' analysis, there is no automatic right to opt out in an action involving monetary claims. However, as this Court stated in *Shutts*, in no uncertain terms, in class actions wholly or predominately involving money damages:

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[5]Petitioners' first argument is that, because the MDL 633 case was in federal court, no due process objection can be raised to binding class members from anywhere in the United States, apart from any claimed right to opt out. Since due process is based on assuring fundamental fairness to the person whose rights are being affected, *see International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945), it is difficult to understand how it is fundamentally unfair for an absent class member from, for example, Maine, to be dragged into a Hawaii state court, while, at the same time, that same person can be dragged into a federal court in Hawaii that is located directly across the street from the state court. It is our understanding that respondents will answer this plea for the availability of nationwide mandatory plaintiff classes in federal courts, regardless of the class member's connection with the forum state, and so we will not address it here. We note, however, that petitioners never attempt to explain why their *Mathews* analysis is appropriate for deciding the due process issue as applied to the right to opt out, but not as to the availability of nationwide classes. While we believe that the balancing of the factors under *Mathews* strongly favors respondents, *see infra* 22 - 29, petitioners have entirely failed to consider the Arizona and Wisconsin class members' distance from the forum, a factor which further supports respondents' position under *Mathews*. In our view, the Court need not and should not decide the issue of nationwide mandatory classes for federal courts, since the judgment below can be affirmed on other grounds, and that issue has far reaching implications that should be addressed only when it is absolutely essential to do so.

> due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.

472 U.S. at 812.

Shutts did not eliminate the mandatory class action in appropriate cases, and the Ninth Circuit decision below, refusing to impose *res judicata* as a bar against claims for monetary damages, does not render unconstitutional all mandatory class actions involving monetary claims. This Court limited its holding in *Shutts* "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Id.* at 811 n.3. In such a case, the right to opt out is required in order to protect an individual's constitutionally recognized property interest in a cause of action for damages. *Shutts*, 472 U.S. at 807; *Tulsa Collection Services v. Pope*, 485 U.S. 478, 485 (1988). Even where money damages is the sole remedy sought by the claimants, there are some cases, such as interpleader actions and limited fund cases properly certified under Rule 23(b)(1)(B), where there is no right to opt out because such a right would destroy the efficacy of such a proceeding. However, proper notice and some minimal contact with the forum state, perhaps less than due process requires for a defendant, would still be required, especially where substantial claims are at stake. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Since there is no question that respondents have a protected property right in their claims for treble damages against petitioner, the issue here is whether respondents can be barred from litigating their claims for substantial monetary damages where they never had an opportunity to opt out of the class in MDL 633. In our view, and that of petitioners, the Court should apply the flexible approach adopted in decisions involving the issue of what process is due before

individuals can be deprived of liberty or property by the government. Of particular significance is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which sets forth the test for determining "what process is due" before the government may deprive a person of an interest protected by the Constitution. Although *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and the analysis required, are identical. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981)(due process standards are intended to ensure that "judicial proceedings are fundamentally fair").

In *Mathews*, this Court required the balancing of three separate factors to determine what process is due:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. And, in *Connecticut v. Doehr*, 111 S. Ct 2105 (1991), this Court recognized that, in a dispute between private parties, the burden of increased procedural protection often falls heaviest on the party who opposes the additional procedure. Therefore, while giving due consideration to any interest the government might have in providing additional protection or foregoing the additional burden, this Court also analyzed the private interest of the party who opposed the additional protections. Accordingly, we will consider each of the four factors in turn.

A. *The Private Interest in Favor of Additional Protection*

The property interest at stake when this litigation was instituted was each class member's claim against petitioners for treble damages, plus attorneys' fees, by reason of an alleged conspiracy to fix the price of title services in thirteen states. The filing of the civil actions followed the initiation of an enforcement proceeding against petitioners by the FTC, alleging substantially the same violations and involving the same thirteen states.

At the time that the original complaints were filed, it would have been possible to estimate roughly the value of each class member's claim.[6] The value of the claim would depend on the type of services rendered by the defendant and the price of the title insurance that was purchased from one of the six companies.[7]

Both the Third Circuit and the Ninth Circuit recognized that the degree of potential deprivation that may be created here by the decision not to allow an opt out was "substantial." Pet. App. 12a; *In re Real Estate*, 869 F.2d at 768. Thus, before the MDL 633 actions were consolidated,

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[6]In 1980, the United States, the State of Arizona, and private class representatives sued the same six defendants in Arizona state and federal courts for price fixing of escrow services. The district court rejected the state action defense and the filed tariff defense. *United States v. Title Ins. Rating Bureau of Arizona*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984). Thereafter, settlements of $4.82 million were obtained. *In re Arizona Escrow Fee Litigation*, Civ. No. 80-840A PHX CAM (D. Ariz. September 22, 1982).

[7]For the years 1981 to 1985, the insurance companies in Arizona collected $137 million for title search services. Ariz. Dept. of Ins. Ann. Rep., 1981 to 1985. In Wisconsin, the companies received $76 million for the same time period. Wisc. Ins. Rep., 1981 to 1985.

12 separate private class actions had been filed, indicating that at least several class members and their counsel perceived their economic stakes in the litigation were sufficient to warrant an effort to recover substantial damage claims, at least in the context of a class action such as the one now before this Court. The permanent elimination of respondents' claims that the MDL 633 settlement agreement purports to effect, in and of itself, implicates respondents' due process rights. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *cf. Greene v. Lindsey*, 456 U.S. 444, 446-47 (1982); *Mullane*, 339 U.S. at 306. Where property has been determined to be substantial in size, this Court has recognized that the private interest in additional process is significant. *Tulsa Collection Services*, 485 U.S. at 488-489; *Mennonite Board of Missions*, 462 U.S. at 798.

The right to opt out would have allowed respondents to preserve their substantial damage claims. Contrary to petitioners' suggestion, in this case respondents' interest in avoiding the *res judicata* effect of the MDL 633 judgment is not based on some abstract interest in controlling the MDL 633 litigation, but upon a concrete interest in obtaining the damages to which they are entitled and which class counsel in MDL 633 settled out from under them for no monetary relief.

B. *Risk of Erroneous Deprivation*

The MDL 633 case vividly illustrates the unfairness that can result from prohibiting persons from removing themselves from a settlement involving substantial damage claims. The purported elimination of respondents' damage claims is premised solely on the fact that respondents, like all other MDL 633 class members, purchased title services from petitioners from 1981 to 1985. However, respondents' interests did not coincide with the rest of the MDL 633 plaintiffs. Not only were some plaintiffs individuals, and others governmental entities, with claims of varying sizes, but none of the named plaintiffs purchased title services in

Arizona and Wisconsin, where petitioners could not successfully raise the state action defense to antitrust liability. By contrast, respondents had purchased title services in Arizona and Wisconsin, and the state action defense has no impact on their claims. The MDL 633 court ignored these variables and treated all plaintiffs the same -- all money damage claims were foreclosed as a condition of the settlement, despite the fact that the pivotal issue in the case, the applicability of the state action defense, by definition, applied differently in each state.[8]

In cases involving money damages, it is particularly important to guard against settlements that may benefit the class representatives, or their attorneys, at the expense of the absent class members. In MDL 633, lawyers, who believed that they saw the class claims evaporate with this Court's decision in *Southern Motor Carriers*, and consequently the elimination of their source for attorneys' fees, negotiated an agreement that would pay them $715,000 in fees and would give the appearance of a benefit to the class members. While some of the class members would not have obtained even a semblance of relief in the absence of the settlement, respondents, who are Arizona and Wisconsin residents, had viable damage claims that were entirely eliminated.

Courts have often demonstrated concern about the possibility of the damage claims of absent plaintiffs being foreclosed by a class action. *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 634-635 (9th Cir. 1982)(certification under (b)(2) limited to injunctive relief to protect opt out on damages in action alleging a pattern or practice of discrimination). The potential for diverging

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[8]In our view, this problem may have gone so far as to deny respondents the adequate representation that Rule 23 and due process requires. *See Hansberry*, 311 U.S. at 32. This presents another reason for this Court to adopt our Rule-bound rationale for affirmance.

interests in class actions involving substantial money damages has led some courts to recognize the need to allow absent class members the right to opt out of even purportedly "mandatory" classes. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981)(allowing an opt out of a (b)(2) class action because, when individual monetary relief is sought, it "begins to resemble a 23(b)(3) action and there has been more concern with protecting the due process rights of the individual class members . . . ."); *Holmes v. Continental Can Co.*, 706 F.2d 1144; *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978).

In other cases where no right to opt out exists, and where there are nonetheless claims for money damages, other safeguards exist that adequately compensate for the lack of an opt out right. Thus, where the interests of the class are unified, such that there is no possibility of differences among class members, the cohesiveness, coupled with adequate representation, provides an appropriate alternative protection. *Califano*, 442 U.S. 682 (class sought equitable relief concerning procedures for recouping Social Security overpayments); *Wetzel*, 508 F.2d at 251 ("cohesive characteristics of the class are the vital core of a (b)(2) action"). In such cases, due process is satisfied because there was adequate representation, the representative plaintiffs' claims were truly typical, adequate notice was given, and, in certain cases, the absent plaintiffs were afforded an opportunity to assert individual claims in the same action. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1166 (5th Cir. 1978); *King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986)(plaintiff received individual notice that settlement adjudicated claims arising out of maternity leave policies and that she had opportunity to make personal claim for monetary relief and/or object to the settlement). However, in a case such as MDL 633, where the differing law of each affected state causes the interests of the class members to diverge, these procedural protections would not satisfy due process because

they are not sufficient to protect against the risk of erroneous deprivation.

C. *The Government Interest*

We acknowledge that there is a strong government interest in efficient and speedy resolution of claims through the class action and Multidistrict Litigation procedures. However, these interests are counterbalanced by the interests of Arizona and Wisconsin in ensuring that these procedures are not misused to settle cases at the expense of their citizens who neither know their rights are being resolved, nor have an opportunity to protect themselves by opting out of the settlement class. Moreover, while settlements are encouraged, it has never been held that such an interest invariably overrides the interest of those affected by the judgment. *Cf. Martin v. Wilks*, 490 U.S. at 768.

In any event, permitting an opt out would not be a major disincentive to settlement for several reasons. First, cases certified under Rule 23(b)(3) already give class members that opportunity, and yet many class actions, both large and small, are settled, including many where some of the claimants have very substantial claims. Second, even if there had been an opt out for the seven states where petitioners had the benefit of the state action defense, it is highly unlikely that many members would have chosen that option, given the minimal likelihood that they would have proceeded, let alone succeeded, on their own. And, where settlements provide meaningful benefits, unlike in the MDL 633 action, very few claimants will choose to run the risk of bettering the outcome by filing their own individual actions, unless they have very large claims and a strong likelihood of success.

D. *Petitioners' Interest Against Additional Protection*

Petitioners may contend that they have relied on the settlement for the past seven years and have faithfully executed their part of the agreement. This interest in repose

exists in all cases that are resolved by settlement or by litigation, but it is only one factor and must be viewed against the backdrop of class action litigation. The Third Circuit recognized in its decision allowing collateral attack on the MDL 633 judgment that:

> it is partly up to the defendants to safeguard the interest of the absent plaintiffs. *See* [*Shutts*,] 472 U.S. at 810. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to insure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

In re Real Estate, 869 F.2d at 770. While petitioners' interest in repose is entitled to consideration, as in all cases where a collateral attack is made on a previous judgment, this interest has never been and should never be, deemed dispositive. *See Hansberry*, *supra*.

Moreover, the actual cost of petitioners' reliance on the *res judicata* effect of the MDL 633 settlement is minimal. The injunctive relief required by the settlement merely required petitioners to abide by the law, consistent with the state action doctrine. The enhancement provisions of the settlement do result in a small shifting of risk from class members benefitting from the provisions to the petitioners, but the cost of these provisions in terms of real dollars is probably quite small because they only benefit policy holders who have title insurance claims, and even then, only those very few whose claims exceed the original policy limits. Furthermore, petitioners retain all of the benefits of the MDL 633 settlement agreement, except as to the damage claims of Arizona and Wisconsin claimants who are respondents here.

Thus, the alternative in this case, as it would be in most other cases, is not thousands of individual actions, but a class action encompassing those absent plaintiffs injured by defendants' activities who feel strongly enough to litigate the issue on their own, as do the Arizona and Wisconsin respondents here.

E. *The Balance Lies Decidedly In Respondents' Favor*

Having reviewed all four factors, the Court must strike an appropriate balance to decide whether the protection given absent class members was adequate. While this balance is "not susceptible of mechanical application . . .," *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978), when judged by the standard of *Mathews v. Eldridge*, there can be no doubt that respondents will only receive the process that they are due if the judgment below is affirmed. *See also Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). The viability of claims asserted in the MDL 633 action hinged entirely on state law which differed in each of the affected states. Absent plaintiffs from Arizona and Wisconsin had substantial damage claims of varying amounts that were unaffected by the state action defense. However, in an effort to dispose of a complex case, a settlement agreement was reached and approved by the MDL 633 court that eliminated the substantial money damage claims of Arizona and Wisconsin plaintiffs for nothing. Arizona and Wisconsin have a strong interest in ensuring that plaintiffs from those states are not deprived of those claims. While there is an interest in the efficient resolution of all claims and in repose, these interests do not justify foreclosing respondents' claims. Based on all these considerations, the only way that respondents will receive all the process to which they are due is for this Court to refuse to foreclose their substantial damage claims by application of the doctrine of *res judicata*.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,*

ALAN B. MORRISON
(*COUNSEL OF RECORD*)
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Counsel for *Amicus Curiae*
Public Citizen

December 14, 1993

*Meredith Fuchs, a 1993 graduate of the New York University School of Law who recently passed the New York State Bar Examination, made a major contribution to this brief. Had she been admitted to practice, she would have been listed as the first counsel for *amicus*.